HUMANITARIAN INTERVENTION UNDER CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED APPROACH

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I. Introduction

The last decade has been marked by a revival of interest in the contemporary applicability of traditional international law doctrines of humanitarian intervention. During the period between the two world wars, a significant number of state elites adhered to a strict construction of the theory that under international law each nation is completely "sovereign" and "independent". Hence, since international law deals solely with external relations between states, and since what occurs within the state between the "sovereign" and his "subjects" has, by definition, no effect on external inter-state relations, intervention for humanitarian purposes by another state on behalf of the "subjects" of a foreign "sovereign" lay outside the scope of international law.[1] Under this theory it was lawful for a foreign state to criticize Hitler's treatment of Polish Jews, but Hitler's persecution of German Jews was entirely his affair. Writing in 1956, summarizing the experience of the thirties, the Thomases were able to conclude that

> Not even the most revolting violations of the common laws of decency and humanity committed by a government against its own subjects was sufficient grounds for other states to criticize officially the political organization which made such outrages possible. Humanitarian intervention in the twentieth century, therefore, retains but little vigor.[2]

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[1] See, generally, Bernard, On the Principle of Non-Intervention 16 (1860); Gareis, Institutions des Volkerrecht 84 (1888); Mannes, "The Object Theory of the Individual in International Law," 46 Am. J. Int'l L. 428 (1952).

[2] A. Thomas & A. Thomas, Non-Intervention 373-74 (1956) [hereinafter cited as Thomas & Thomas].

Writing in 1963, Brownlie's conclusion was more categorical: ". . . the institution [of humanitarian intervention] has disappeared from modern state practice."[3]

Neglect of the potentiality of traditional humanitarian intervention doctrines was not confined to the theorists of absolute state "sovereignty". In their seminal work on Law and Minimum World Public Order, published in 1961, McDougal and Feliciano alluded to the traditional theories only in passing, and characterized the doctrines as "amorphous"[4] and "relatively obsolete".[5] Yet even the most forgotten of laws have a habit of re-emerging when there is need for them, and humanitarian arguments have surfaced most prominently in justification of the American-Belgian rescue operation in the Congo in 1964, in support of the United States' intervention in the Dominican Republic in 1965, and most recently in favor of the 1971 Indian operation which led to the creation of Bangladesh. International legal scholars have also argued that legality of intervention to redress violations of human rights in Rhodesia[6] and to mitigate the suffering during the Nigerian civil war.[7] Humanitarian intervention has also been advanced as an alternative justification for the 1970 South

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[3] I. Brownlie, International Law and the Use of Force By States 340 (1963).

[4] M. McDougal & F. Feliciano, Law and Minimum World Public Order 536 (1961).

[5] Id. at 90.

[6] McDougal & Reisman, "Rhodesia and the United Nations; The Lawfulness of International Concern," 62 Am. J. Int'l L. 1, 12 (1968). Professor Falk has also suggested that intervention for "humanitarian considerations" would be lawful in Angola and the Republic of South Africa, Falk, Historical Tendencies, Modernizing, and Revolutionary Nations, and the International Legal Order, 8 How. L. J. 128, 150 (1962).

[7] Reisman, "Humanitarian Intervention to Protect the Ibos," Privately circulated in 1968. Reprinted in Humanitarian Intervention and the United Nations 167 (R. Lillich ed. 1973).

Vietnamese military operations in Cambodia aimed at evacuating ethnic Vietnamese refugees, "in view of the widespread killing of Vietnamese civilians by Cambodians."[8] A spate of scholarly articles is about to appear on the subject, occasioned no doubt by recent events in the Indian subcontinent.[9]

In light of these developments, it should come as no surprise that the contemporary status of the doctrine of humanitarian intervention is by no means clear. The traditional doctrines were never particularly well defined, and whatever clarity they may have had was lost through neglect. Revival of the customary theories during the last ten years would be better characterized as a contemporary creation of the law, rather than a historical restoration.

Several features of the current efforts to re-interpret the law of humanitarian intervention are worth noting in some detail. An excursus into some of the history of the traditional doctrines is mandatory, not only to establish that a right of intervention for humanitarian purposes existed in customary international law, but also to facilitate examination of the policy foundations of the traditional law. Secondly, if a right of humanitarian intervention is to become viable under present international law, some way of reconciling that right with the United Nations Charter is a practical necessity. This involves a doctrinal exercise. Thirdly, the history of the Congo, Dominican Republic, and Bangladesh controversies must be studied in order to discern what the contemporary international expectations are concerning the future development of the law and in order to predict the likely limitations the international community will impose on the use of humanitarian intervention.

II. Delimitation of the Problem: A Contemporary Definition of Humanitarian Intervention

Humanitarian intervention might be defined most usefully as the use of the military instrument by one or more states in the territory of another state for the purpose of ensuring compliance with a minimum international standard of human rights.

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[8] J. N. Moore, Law and the Indo-China War 495, 507-08 (1972).

[9] In addition to Humanitarian Intervention, supra note 7, see, e.g., Franck & Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force," 67 Am. J. Int'l L. 275 (1973); and Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter," 4 Calif. W. Int'l L. J. 203 (1974). See also Nanda, "A Critique of the United Nations Inaction in the Bangladesh Crisis," 49 Denver L. J. 53, 54 (1972).

This definition is at once more expansive and more restrictive than traditional definitions. For example, the Thomases define humanitarian intervention as "the right of one state to exercise international control over the acts of another in regard to its humanity."[10] The Thomases' definition contemplates the use of a wide variety of strategies to achieve humanitarian goals. Certainly states have made use of the diplomatic, economic, and ideological instruments as well as the military instrument in their intercessions for humanitarian reasons. The classic method of intercession was of course the diplomatic protest, and in recent years the international community has made increasing use of ideological campaigns and economic sanctions in its effort to combat deprivations of human rights in South Africa and Rhodesia. While even these non-military interventions would be condemned under the strictest theory of state "sovereignty",[11] contemporary practice indicates that use of the non-military strategies to protect human rights is generally accepted as being lawful under international law.[12] The real battle among international lawyers concerns the lawfulness of the use of the military instrument to prevent abuse of fundamental human rights. Thus, while it is important to recognize that other strategies may be employed with great effect to secure recognition of basic human dignity values, this essay will confine the use of the term "humanitarian intervention" to mean the right of states to use military force to restore a minimum public order in which human rights receive effective protection.[13]

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[10] Thomas & Thomas at 372.

[11] When the United Nations investigated alleged denials of fundamental human rights in a particular state, the affected states' leaders invariably invoke the principle of "domestic jurisdiction" and contend that the U.N. action is ultra vires. For an account of early U.N. experiences investigating deprivations in South Africa and the Soviet Union, see Thomas & Thomas 378-384.

[12] Thomas & Thomas at 384.

[13] Professor Falk agrees that discussion should be confined to situations in which actual force is used. Otherwise "the subject of intervention becomes so vague that it slips outside the framework within which legal technique can operate usefully." R. Falk, Legal Order in a Violent World 160 (1968).

Traditional definitions have also been hampered by their focus on state "sovereignty". For example, Stowell defines humanitarian intervention as "the reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice."[14] This definition presupposes that a sovereign is in effective control of his territory, his government, and his people. In situations of civil war, however, these presuppositions may be wholly inaccurate. In the recent Nigerian civil war, for example, General Gowon publicly confessed that he had no control over his army in the field. While General Gowon may not have wished wholesale destruction of the Ibo people, General Adekunle harbored very different views, and he had control over the conduct of the war in the Eastern Region.[15] Many situations involving gross deprivations of human rights are likely to arise, not when a sovereign is mistreating his subjects, but rather when there is no elite recognized as authoritative and controlling, when the public order of a community has degenerated into violent anarchy. In the Dominican crisis, for example, the United States State Department emphasized that the American action was taken

> after the United States had been officially notified by Dominican authorities that they were no longer able to preserve order. The factual circumstances of the breakdown of order in the Dominican Republican [sic] were such that the landing could not have been delayed beyond the time it actually took place without needless sacrifice of lives. . . .[16]

This dimension of humanitarian intervention is of great contemporary significance. Intervention in situations of violent anarchy need not in-

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[14] E. Stowell, Intervention in International Law 53 (1921).

[15] M. Reisman, "Letter to the Honorable Richard M. Nixon," Nov. 13, 1968. Parenthetically, General Gowon has recently been given credit for his role as the principal architect of amnesty and post-war rehabilitation in Nigeria. The Ibos are said to refer to him as "that Christian soldier who kept the northerners from killing us all." Times, Jan. 29, 1973, at 8.

[16] U. S. State Dept. Memorandum, "Legal Basis for U.S. Actions in the Dominican Republic," 111 C.R. 10734 (daily ed. May 20, 1965).

volve "technical violations"[17] of Article 2(4) of the United Nations Charter. Intervention in those situations would not be directed at the "territorial integrity or political independence of any state," since established governmental structures have collapsed. The Finnish jurist V. Saario, for example, argues that humanitarian intervention directed against an authoritative elite in effective control would be banned unless authorized by the Security Council.[18] But he emphasizes that Article 2(4) would not apply

> when the administration of a State has completely collapsed because of internal unrest and the authorities have lost control of events. In such circumstances the State as a subject of international law has been temporarily paralysed; it is unable to protect its citizens, not to speak of aliens sojourning in its territory, or to carry on its other responsibilities.[19]

Nevertheless, Stowell's definition does emphasize that humanitarian intervention was historically perceived as an available remedy against a sovereign who grossly mistreated his subjects. Grotius, for example, acknowledged that ancient "sovereigns" claimed some "special right" over their subjects, but he also insisted that this right was not without limits:

> But if a tyrant . . . practices atrocities towards his subjects which no just man can approve, the right of human social connection is not cut off in such a case. So Constantine took arms against Maxentius and Licinius; and several of the Roman emperors took or threatened to take arms against the Persians if they prevented not the Christians from being persecuted on account of their religion.[20]

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[17]Professor Nanda calls the Bangladesh operation a "technical violation" of Article 2(4) of the Charter because he doubts the validity of India's claim of self-defense. It is not clear whether he would also regard an Indian claim to intervene on humanitarian grounds in the context of the East Pakistani case as a "technical violation" of the Charter. Nanda, supra note 9, at 65.

[18]Comments by V. Saario on "Report of the International Committee on Human Rights," at 52 International Law Association, New York Conference, (1972).

[19]Id. at 46.

[20]Grotius, De Jure Belli ac Pacis, Bk. II, Ch. XXV, Sec. 8 (Whewell's tr. 1853).

In other words, no sovereign is above and beyond the domain of law; while international law honors state "independence" and "sovereignty", that "sovereignty" must be lawfully exercised. If a sovereign abuses his sovereignty, if he perpetrates crimes against humanity, other states can lawfully use military force in protection of fundamental human rights.[21] Sir Hersch Lauterpacht, perhaps the most eminent of post-World War II jurists who have reasserted the lawfulness of humanitarian intervention, echoes this "abuse of sovereignty" theme in colorful language. Lauterpacht declares that Article 2(4) of the United Nations Charter is not violated when states exercise forcible self-help "in cases in which a State maltreats its subjects in a manner which shocks the conscience of mankind."[22]

Much of the writing on humanitarian intervention has been influenced by natural law theory, emphasizing the inalienable rights of man. Natural law theorists regard humanitarian intervention as an implicit "exception to all rules" of non-intervention set up under customary international law or even under the United Nations Charter.[23] A committee of experts, assigned by the League of Nations in the 1920's to codify customary international law, invented a hypothetical contract among states obligating each of them to guarantee to people within their territories the protections of natural law:

> Some rights are not rights created by States for the benefit of their nationals or of foreigners; namely, the right to life, the right to liberty, and the right to own property. The community has simply recognized the existence of these rights and States have mutually undertaken to ensure the possibility of enjoying them. . . . Before these rights, nationality sinks into the background, because they belong to the man as a human being, and are not, accordingly, subordinate to the will of the State.[24]

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[21] See Fenwick, International Law 287-88 (4th ed. 1965); 1 Oppenheim, International Law 312-13 (8th ed. Lauterpacht 1955); Stowell, International Law 349 et.seq. (1931). On the abuse of rights doctrine see Gutteridge, "Abuse of Rights," 5 Camb. L. J. 22, 25 (1935).

[22] H. Lauterpacht, International Law and Human Rights 32 (1950).

[23] D. Thapa, "Humanitarian Intervention" (unpublished graduate law thesis, McGill University, 1968), cited by Lillich, "Intervention to Protect Human Rights," 15 McGill L. J. 205, 211 (1969).

[24] Report of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law on

Under this theory, the state elite which refuses to grant its nationals minimal human rights has breached its contract with other state elites of the international community. It would certainly be plausible to argue that humanitarian intervention would be a lawful measure of self-help available to other state elites to remedy the breach of contract.

But it is not necessary to concoct a fictional contract among the elites to justify humanitarian intervention. The principal contribution of the natural law theorists was their insistence on an international minimum standard of human rights, a minimum standard authorized and maintained by international law. As Guggenheim noted in his treatise, published after the adoption of the U.N. Charter,

> . . . le droit coutumier confere aux autres Etats le droit de mettre fin a la competence exclusive de l'Etat qui fait subir a ses nationaux un traitement inferieur au standard minimum du droit des gens. Dans ce cas, une intervention humanitaire serait justifiee.[25]

In an earlier work, Borchard also stressed the idea of a minimum standard. In his view, any particular state elite is limited in its "sovereignty" by overriding principles of international law; the "domestic jurisdiction" of any state is conditional rather than absolute:

> . . . where a state under exceptional circumstances disregards certain rights of its own citizens, over whom it presumably has absolute sovereignty, the other states of the family of nations are authorized by international law to intervene on grounds of humanity. When these "human" rights are habitually violated, one or more states may intervene in the name of the society of nations and may take such measures as to substitute at least temporarily, if not permanently, its own sovereignty for that of the state thus controlled. Whatever the origin,

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"Responsibility of States for Damage Done in their Territories to Person or Property of Foreigners," 20 Am. J. Int'l L., Special Supp. 177, 182 (1926). Emphasis added.

[25] P. Guggenheim, Traite de Droit International Public 289 (1953).

> therefore, of the rights of the individual, it seems assured that these essential rights rest upon the ultimate sanction of international law, and will be protected, in the last resort, by the most appropriate organ of the international community. . . .[26]

Borchard's statement also illustrates another important feature of the traditional law of humanitarian intervention: the intervening state could "substitute" its own "sovereignty" for the "sovereignty" of the tyrant, perhaps not indefinitely, but for a reasonable time. It might be argued that this "substitution of sovereignty" theory turned humanitarian intervention doctrine into a cloak for imperialist expansion, but that was not the understanding of the powers who engaged in humanitarian intercessions. In 1860, alarmed by Turkish misrule in Syria and by the massacre of thousands of Christians by the Turks, Austria, France, Great Britain, Prussia, and Russia convened the Conference of Paris, which collectively authorized France to intervene militarily in Syria on behalf of the Conference. The Paris Protocol was quite explicit in denying any imperial aims:

> . . . les Puissances Contractantes n'entendent poursuivre ni ne poursuivront dans l'exécution de leurs engagements, aucun avantage territorial, aucune influence exclusive, ni aucune concession touchant le commerce de leurs sujets, et qui ne pourrait être accordée aux sujets de toutes les autres nations.[27]

It seems more reasonable to interpret the "substitution" theory not as a doctrine justifying imperial acquisition, but rather as a realization that the intervening power will have to have effective control over the other state's territory during the limited period of occupation. Otherwise, no humanitarian intervention could be successful.

This does not mean that humanitarian interventions were confined to rescue operations in time of great crisis. Traditional doctrine and practice contemplated "the fashioning of more permanent structures of social and political order."[28] In the Syrian case just referred to, for example,

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[26] E. Borchard, The Diplomatic Protection of Citizens Abroad 14 (1916). Emphasis added.

[27] 51 Brit. & Foreign State Papers 279. Emphasis added.

[28] Reisman, supra note 7, at 2.

the Conference of Paris authorized the drafting of a new constitution for Lebanon, which provided for a Christian governor who would be responsible to the Porte.[29] Apparently the intervening powers decided that persecution of the Christians would not be prevented unless governmental structures within the Ottoman Empire were modified. The Syrian case is extremely important, because even publicists critical of humanitarian intervention recognize the Syrian operation as lawful.[30]

The Greek intervention of 1830 is even more pertinent, because it not only resulted in a new constitution or a new governor, but also in the creation of a new state. Appalled by treatment of the Greeks by the Ottoman Empire, and at the request of the Greeks, Great Britain, France, and Russia pledged their support in the London Treaty, for "an arrangement called for, no less by the sentiments of humanity, than by interests for the tranquility of Europe."[31] At this point Great Britain, France, and Russia undertook an armed intervention which ultimately resulted in Greek independence.[33]

The recent Indian operation in East Pakistan will be discussed at greater length in a later section of this paper. For the moment, however, it is interesting to note how closely analogous the Bangladesh case is to the Greek intervention in 1830. Once again intervention resulted in the creation of an independent state. In the Security Council debates of December 4, 1971, which took place while the Indian military operation was still in progress, Mr. Sen, the Indian Ambassador, hinted unmistakably at the creation of a new regime:

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[29] 51 Brit. & Foreign State Papers 288-292.

[30] For example, after reviewing the nineteenth century cases, Brownlie argues that "The State practice justifies the conclusion that no genuine case of humanitarian intervention has occurred, with the possible exception of the occupation of Syria in 1860-61." Brownlie, supra note 3, at 340.

[31] 14 Brit. & Foreign State Papers 633.

[32] Id. at 1045.

[33] Reisman, supra note 7, at 19.

> India wished to give a very serious warning to the Security Council that it would not be a party to any solution that would mean continuation of the oppression of the East Pakistani people.[34]

The Bangladesh case may necessitate a rethinking of recent scholarly attempts to give contemporary content to the customary international law of humanitarian intervention. In a comprehensive study of a wide variety of foreign interventions in internal conflict, John Norton Moore has categorized humanitarian intervention as one of a variety of "non-authority-oriented" interventions, "where objectives are other than the influencing of authority structures."[35] By "authority structures" Professor Moore apparently means the existing governmental structures of foreign states, including the current effective elites. Thus he argues that relief for Biafra would only have been lawful "if aimed at avoiding mass starvation rather than establishing a second state."[36] He also hints that the Stanleyville mission would have been unlawful if it had been aimed not only at rescuing the hostages, but also at "the Gbnye regime."[37]

It should be clear that Professor Moore's notion of the permissibility of humanitarian intervention is quite different from the traditional doctrines. As the Greek and Syrian cases demonstrate, nineteenth century theory and practice was strongly "authority-oriented," as was the Indian intervention in Bangladesh. The "abuse of sovereignty" doctrine contemplated the replacement of abusive "sovereigns" with "sovereigns" who would obey the ius cogens of the wider international community. In this sense any ruling elite is limited in its "authority"; it must exercise its power in ways which are consistent with a minimum international standard of human rights. Professor Moore's categorization of humanitarian intervention as "non-authority-oriented" is therefore misleading; the very essence of the traditional doctrine was its emphasis on authority, its insistence on the delineation between permissable and impermissable exercise of power by state elites over their citizens.

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[34] 9 U.N. Monthly Chronicle 9 (January 1972).

[35] Moore, supra note 8, at 118. On this point, see idem, "The Control of Foreign Intervention in Internal Conflict," 9 Va. J. Int'l L. 205, 261-264 (1969).

[36] Id. at 102.

[37] Id. at 226.

In fairness to Professor Moore, it must be pointed out that he has reformulated his theory substantially in light of the Bangladesh experience. He now recognizes both non-authority-oriented and authority-oriented humanitarian interventions,[38] and his sole insistence is that the humanitarian intercession have "the minimal effect on authority structures necessary to protect the threatened [human] rights."[39] This latter requirement is probably a restatement of the traditional law on the subject.

One final aspect of this essay's suggested definition of humanitarian intervention deserves additional emphasis. The proposed definition links a state's right to intervene to violations by another state of an international minimum standard of human rights. Implicit in such a definition is a notion that the international minimum standard which all governments owe to their citizens is not a static and unchanging set of rules, but rather a developing, evolving standard which reflects contemporary expectations about the scope of protection given to individual human beings in their exercise of fundamental human rights. Thus, the effort is not only to set a minimum international standard, a standard which provides more international protection of basic human rights than was provided under traditional international law. The United Nations Charter itself, particularly in the Preamble and Articles 1 and 55, reflects this general objective. Since the Second World War, beginning with the Universal Declaration of Human Rights in 1948, the world community has striven to increase both the scope of basic human rights and the means available for their protection; this movement has been increasing in velocity and in power in recent years.[40] In short, the scope of humanitarian intervention may, in fact, be greater in the latter half of the twentieth century than it was in the nineteenth, despite the strictures against the use of force found in Article 2(4) of the Charter: this is because the "conscience of manking" has been raised to a higher level.

III. A Conflict in Perspectives: The Underlying Policy Debate

Given the depth of contemporary concern for the advancement of human rights in the world community, it is surprising to learn that many commentators feel that the ancient doctrines of humanitarian interven-

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[38] J. N. Moore, "Toward an Applied Theory for the Regulation of Intervention" in Law and Civil War in the Modern World (J.N. Moore ed. 1974; in press, Johns Hopkins Univ. Press), at [MS 26].

[39] Id. at [MS 31].

[40] The comst convenient collection of contemporary international prescriptions on human rights is Basic Documents on Human Rights (I. Brownlie ed. 1971).

tion have not survived the United Nations Charter. The opponents of humanitarian intervention have advanced a number of arguments in support of their position.

The most consistently invoked counter-argument to humanitarian intervention holds that any unilateral national military intervention would be against the "territorial integrity and political independence" of another sovereign state and hence "in literal violation of Article 2(4) of the U.N. Charter."[41] Opponents of the doctrine commonly seek refuge in Article 2(7) of the Charter, which embodies the principle of "domestic jurisdiction."[42] In essence, this argument is nothing more than a variant of the old, discredited doctrine of absolute state "sovereignty", under which even the most heinous "domestic" violations of human rights would escape international review. As noted earlier, some jurists would carve out an exception "where immediate action is indispensable to save human life or to avert human sufferings caused by circumstances outside the control of a responsible Government,"[43] but this is little consolation to victims of deliberate brutalities perpetrated by governments in effective control. Some authorities refuse to permit even this limited exception. Professor Henkin states that in civil war "cases such as Biafra and Bangladesh, where foreign military intervention would help secession, the use of force is against the territorial integrity of the 'parent' state,"[44] and hence in violation of the Charter.

Professor Henkin's position merits fuller discussion. Professor Henkin laments the fact that "civil wars are often ethnic wars and therefore literally genocidal on both sides."[45] This, he admits, places international lawyers in a terrible dilemma:

> But while genocide is illegal [under the Genocide Convention and perhaps under customary international law], civil war is not. That, we must recognize, is at the heart of our problem. Civil war is not illegal under international law; neither, I must conclude,

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[41] Henkin, "Remarks", 1972 Proceedings, Am. Soc'y Int'l L. 95, 96.

[42] See, for example, the remarks of Agha Shahi of Pakistan in the Security Council debates of 4 December 1971: "A principle basic to the maintenance of peace [is] that no political, economic, strategical, social, or ideological considerations might be invoked by one State to justify its interference in the internal affairs of another State. . . ." 9 U.N. Monthly Chronicle 7 (January 1972).

[43] Saario, supra note 18, at 46.

[44] Henkin, supra note 41, at 96.

[45] Ibid.

> is the suppression of secession. Despite developments in the concept of self-determination, it is not yet accepted, and is not likely to be accepted soon, that any part of a state has the right to break away, and that it is unlawful for the "parent" state to seek to prevent it, even by force.[46]

Professor Henkin is troubled by this conclusion. Although he recognizes that "in our time civil war, like international war, tends to be total war," he also makes an eloquent plea "to introduce and establish by law elements of moderation, of proportionality, of humanitarianism."[47] But he does not offer any satisfactory means of enforcing those limits on the conduct of operations in a civil war. He rejects "unilateral national intervention" as a means of curbing the excesses of "total" war and opts for "multilateral intervention" under U.N. auspices as "the most appealing remedy."[48] Yet he is forthright enough to admit that this remedy may be illusory, since "usually the international community cannot act at all, because of the national and international politics that dominate each civil war situation."[49] The Biafran and Bangladesh cases tragically reaffirm this pessimistic conclusion; not even the most lurid and horrible violations of human rights could galvanize international organizations into action.[50]

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[46] Id. at 95.

[47] Id. at 96. Interestingly enough, the Pakistani representative to the United Nations acknowledged that international law prohibited certain methods of fighting civil wars; in this sense all war is "limited" rather than "total". Mr. Shahi argued for the principle that a government in effective control "was entitled to take all reasonable and adequate steps [against subversion] to safeguard its existence and its institutions." Emphasis added. Mr. Shahi went on to insist that "Pakistan by no means exceeded that right in suppressing armed and terrorist bands which aimed at dismemberment of the State." 9 U.N. Monthly Chronicle 6 (January 1972). Mr. Shahi did not mention what remedies might be available to the international community if world opinion found the Pakistani Government's reaction to the electoral victory of the Awami League both unjustified and excessive.

[48] Ibid.

[49] Id. at 95-97.

[50] For a critique on United Nations inaction in the Bangladesh crisis, see generally, Nanda, supra note 9. Professor Lillich similarly criticizes the lack of a United Nations response to the Nigerian civil war. Lillich, supra note 23, at 216.

In short, if international law is to be capable of introducing and establishing "elements of moderation, of proportionality, of humanitarianism" in the conduct of civil wars, it will have to develop more effective procedures of enforcement than Professor Henkin proposes.[51] If human rights are to receive even the most minimal degree of protection, if the human rights movement is to be something more than slogans of "positive morality," it may be necessary to permit individual states to make the initial "determination of when it is appropriate to embark upon a humanitarian mission . . . subject to review and revision by the world community."[52]

Professor Henkin's main fear is that such a decentralized decision-making process will invariably be subject to abuse:

> A humanitarian reason for military intervention is too easy to fabricate. In fact, often it would not be a complete fabrication. . . . The United States, for example, made a few humanitarian noises in 1965 before going into the Dominican Republic. Every case of intervention I can think of, in fact, was justified on some kind of humanitarian grounds, not all of them wholly false.[53]

There is no doubt that "any procedure that allows a single state, or a small group of states, to use force without the prior authorization of a supranational body is a doctrine productive of possible abuse."[54] As the Thomases remind us, Hitler justified his acts of aggression against Czechoslovakia on the ground that the alleged persecution of ethnic Germans in the Sudetenland by the Czech government was a matter of international concern warranting intervention by the Third

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[51]Professor Henkin makes a notable plea to "prepare human rights machinery" which would concentrate on "long-term attempts to anticipate and prevent ethnic wars." Henkin, supra note 21, at 97. This is, of course, a laudable suggestion, but it does not offer any guidelines for handling a crisis situation when efforts to avoid a crisis have failed.

[52]Lillich, supra note 23, at 217-218.

[53]Henkin, supra note 41, at 96.

[54]Lillich, supra note 23, at 217.

Reich.[55] Pravda justified the Soviet invasion of Czechoslovakia in 1968 on quasi-humanitarian grounds: the Russians insisted they were "defending the socialist gains of the Czechoslovak people," and alleged that the Warsaw Pact nations could not be "inactive in the name of an abstractly understood sovereignty, when they saw that the country stood in peril of antisocialist degeneration."[56]

These celebrated cases of abuse are truly at the heart of the criticisms levied against proponents of a modern doctrine of humanitarian intervention. Non-humanitarian or even aggressive motives may lurk behind a humanitarian facade. Because of this potentiality for abuse, some publicists advocate an across-the-board prohibition of forcible self-help measures. Thomas M. Franck, for example, argues: "It would be best, obviously, to have these questions determined by some third-party process, but if that proves impossible, then, I think, it would be better to have the law prohibit all interventions."[57] But this so-called "solution", in the words of Professor Lillich, "constitutes a classic example of throwing the baby out with the bath water."[58] How many Biafras, how many Bangladeshes must the international community endure to give effect to this far-from-neutral "principle"? As Professor Reisman so eloquently concludes: "We have waited too long and have already lost our innocence; if we cannot perfect, as a minimum, a system of humanitarian intervention, we have lost our humanity."[59]

From a more scholarly and less impassioned perspective, there are additional difficulties with the across-the-board, flat prohibition approach. The first difficulty lies in its misunderstanding of the way all legal processes, but particularly the international legal process, work. International law is not usefully conceived as a body of rules,

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[55] Thomas & Thomas at 374.

[56] Pravda Article Justifying Intervention in Czechoslovakia, 7 Int'l Leg. Mat. 1323, 1324.

[57] Comments by T. M. Franck on "Report of the International Committee on Human Rights", 50-51, International Law Association, New York Conference, 1972.

[58] Lillich, supra note 23, at 217.

[59] Reisman, supra note 7, at 41.

of flat prohibitions, but rather "as a process of authoritative decision transcending state lines,"[60] an endless process of claims and counter-claims, a network of reciprocities and retaliations, a system of sanctions involving value deprivations and indulgences. The international legal process may be viewed as an effort by the participants in the process to accept those claims which genuinely clarify the common interests of the entire global community and to reject those claims which plead only for special interests destructive of the interests of the wider community.

At a somewhat lower level of abstraction, it is obvious that such a conception of international law recognizes that many of the claims put forward by states and other participants will often be self-serving, sometimes disingenuous, and occasionally downright deceitful. But in a world in which no one state is able to exercise hegemonial powers, these claims will ultimately be rejected. In other words, if a state uses the language of humanitarian intervention to characterize its actions, it must also conduct its operations within the limits set by international expectations; otherwise the humanitarian argument will be exposed as a sham. As McDougal and Feliciano observe in a perceptive passage:

> The characterization is, of course, made by an individual state at its own peril. It partakes, in other words, of the nature of a provisional determination in precisely the same way that a claim of self-defense does, and remains subject both to the contemporaneous appraisal of other individual states and to the subsequent review the organized community may eventually exercise. . . . A policy of permitting individual initiative is, of course, again like the policy of allowing self-defense, susceptible to perverting abuse; but this susceptibility is an attribute common to all legal policy, doctrine, or rule.[61]

After several centuries of experience, the international community has become quite adept at distinguishing the genuine claims from the spurious. If international lawyers do not possess this skill, they certainly should be trained in the art--they cannot function without it. It is not an impossible burden: Hitler's claim that the Czech government was persecuting Germans in the Sudetenland "was a fiction supported by

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[60] McDougal & Feliciano, supra note 4, at vii.

[61] Id. at 416.

framed incidents."[62] A competent lawyer on learning this could easily conclude that "the principle under which the Germans claimed to be acting was applied to the wrong set of facts."[63] The Soviet justification for the 1968 invasion of Czechoslovakia was even more transparent: in essence the Russians claimed the right of a great power to intervene militarily in the affairs of an allied country when internal political events in that country took a path different from Communist orthodoxy. In short, the Brezhnev Doctrine is nothing more than a new name for Russian imperialism; it "amounts to denying in principle the sovereignty of any 'socialist' country accessible to the Soviet Union."[64] While the Russians have for the most part succeeded in crushing Dubček's "socialism with a human face", they have not done so without cost. Moscow has been compelled by international pressure to retreat from the principles of the Brezhnev Doctrine, and one scholar has even argued that the Doctrine was officially repealed by the Kremlin during President Nixon's visit to the Soviet Union in May, 1972.[65]

In short, a state should be careful to communicate its actual intentions to the world community; its characterization is indeed made "at its own peril." Often the would-be intervening state must also take into account domestic criticisms of its policies: Senator Wayne Morse declared that the United States State Department Memorandum justifying American actions in the Dominican Republic in 1965 "would not receive a passing grade in any law . . . school in the United States."[66]

Secondly, as McDougal and Feliciano pointed out, the policy of permitting individual states to make the initial decision to employ military coercion is duplicated in many other spheres of the international law governing the use of force. Article 51 of the U.N. Charter preserves "the

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[62] Thomas & Thomas at 374.

[63] Ibid.

[64] Lowenthal, "The Sparrow in the Cage," 17 Problems of Communism 2, 24 (Nov. - Dec. 1968).

[65] Schwebel, "The Brezhnev Doctrine Repealed and Peaceful Co-Existence Enacted," 66 Am. J. Int'l L. 816 (1972).

[66] 111 Cong. Rec. 10734.

inherent right of individual or collective self-defence if an armed attack occurs. . . . " The victim state does not have to seek the consent of the Security Council prior to initiating retaliatory action. This "inherent right of . . . self-defence" can easily be abused; a truly unscrupulous state will have little difficulty manipulating the language of self-defence doctrine to suit its own illicit purposes. The Russians justified their invasion of Czechoslovakia as a necessary measure of self-help, not merely to defend the "socialist gains" of the Czechoslovaks, but also to defend the "socialist gains" built up in the Soviet Union and throughout Eastern Europe:

> The weaking of any of the links in the world system of socialism directly affects all the socialist countries, which cannot look indifferently upon this. . . . Czechoslovakia's detachment from the socialist community would have come into conflict with its own vital interests and would have been detrimental to the other socialist states. . . . Discharging their internationalist duty toward the fraternal peoples of Czechoslovakia and defending their own socialist gains, the U.S.S.R. and the other socialist states had to act decisively and they did act against the anti-socialist forces in Czechoslovakia.[67]

The Kremlin thus employed the language of "anticipatory self-defense" as well as the concepts of humanitarian intervention to justify its forcible intervention into Czechoslovak affairs. But Moscow not only abused traditional legal doctrines in coming up with a justification of its actions; the Soviets also indicated that they might abandon the whole of international law if it did not serve their interests:

> The socialist states respect the democratic norms of international law. . . . However, from a Marxist point of view, the norms of law, including the norms of mutual relations of the socialist countries, cannot be interpreted narrowly, formally, and in isolation from the general context of class struggle in the modern world.[68]

In other words, even a flat prohibition may have little effect in deterring a determined aggressor. Since any doctrine is susceptible to perverting abuse, it is no answer to criticize humanitarian intervention doc-

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[67] Pravda Article, supra note 56 at 1323.

[68] Ibid.

trines on that ground. Much greater abuses will, in fact, take place if tyrants are assured that they may violate human rights with impunity because of a strict rule of non-intervention.

A second, related criticism of the doctrine of humanitarian intervention has as its central thesis the fact that states usually intervene for a mixture of motives, not all of them humanitarian. Professor Henkin warns us that "it is not possible in civil wars to isolate and act only upon genocide and other human rights violations;"[69] the intervention invariably takes on "political" overtones. Dr. Brownlie contends that humanitarian arguments surface frequently as "a subsidiary justification for an intervention which is an expression of purely national policy."[70] In other words, even if a state has genuine humanitarian motives, its actions may be tainted by the ambitions of power politics, efforts to gain ground in the Cold War, or other "selfish motives".[71] The Pakistani argument before the United Nations Security Council during the debates over Bangladesh relied heavily on the "ulterior motive" hypothesis to condemn the Indian invasion. Agha Shahi, the Pakistani representative, declared that

> India found in Pakistan's internal crisis a potent means for the execution of its designs. Those designs were perhaps best started by an Indian political publicist, Mr. S. Swamy, who wrote in Motherland, New Delhi, on 15 June: "The break-up of Pakistan is not only in our external security interests but also in our internal security interests. India should emerge as a super-Power internationally and we have to nationally integrate our citizens for this role. For this the dismemberment of Pakistan is an essential pre-condition."[72]

Naturally, there was a grain of truth in Mr. Shahi's assertions; the emergence of Bangladesh removed Pakistan as a significant influence in

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[69] Henkin, supra note 41, at 96.

[70] Brownlie, supra note 3, at 339.

[71] Brownlie finds "selfish motives" in most of the celebrated cases of humanitarian intervention of the nineteenth century. Id. at 339-340.

[72] 9 U.N. Monthly Chronicle 7 (Jan. 1972). Mr. Shahi's selection of the remarks of an Indian political columnist serves as an effective tool

Southeast Asian affairs. This certainly simplified India's security problems. India's motives were, of course, not entirely unselfish. Bogen has argued, somewhat naively, that "where the decision to intervene falls to a single state, it should be safeguarded by a requirement that the state be totally disinterested."[73] This requirement would doom all but the most theoretical instances of humanitarian intervention. As Bogen himself later recognizes, unless a state has some definite interest, "no single government is willing to expend the money and manpower necessary for action."[74] Biafra is tragic proof of that statement.

As Professor Henkin noted, the political reality is too complex to present the world with an "ideal type" of humanitarian intervention in which the intervening state had no other interests. Critics will always be able to assert that any humanitarian operations is, in reality, only a "pretext"[75] disguising the "real" intentions of the intervening states. Yet just because there is always a mixture of motives underlying any decision to intervene does not mean that disengaged observers committed to human dignity values will be paralyzed in their attempts to evaluate a particular claim to intervene for humanitarian purposes. The predominant purpose of the intervention will surface soon enough, and the intervening state will be aware that its actions will be under intense scrutiny by the international community. Any time a state resorts to the use of force for any purpose its actions are evaluated in terms of the goals being sought: these goals may be selfish or more inclusive, asserted on behalf of special, parochial interests or on behalf

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of debate, but a rather obvious one. It would not be difficult to discover some Indian publicist somewhere who would opine that the dismemberment of Pakistan was a cardinal foreign policy goal; Indians have been arguing this since the Partition.

[73]Bogen, "The Law of Humanitarian Intervention: United States Policy in Cuba (1898) and in the Dominican Republic (1965)," 7 Harv. Int'l L. J. 296, 311 (1966).

[74]Id. at 313.

[75]Howard Weisburg points out that the use of the word "pretext" by protesting states tacitly constitutes a recognition that the subject matter of humanitarian intervention is indeed legitimate. In other words, if the operation were not a pretext, it would, in fact, be legal. Weisburg predicts that the assailants of a particular operation "would tolerate the use of force in the protection of human rights in a more factually neutral case." "The Congo Crisis 1964: A Case Study in Humanitarian Intervention", 12 Va. J. Int'l L. 261, 269-270 (1972).

of special, parochial interests or on behalf of the entire world community. Humanitarian interventions have been classified as falling within this latter category;[76] certainly "the use of armed force in defense of human rights is as emphatically in the common interest as is the maintenance of international peace and security."[77]

If the Indian operation in Bangladesh is upheld as a legitimate exercise of the right of humanitarian intervention, this will mean that the presence of other and more selfish motives behind the Indian action did not ultimately taint the operation as unlawful. This would place contemporary humanitarian intervention doctrine fairly close to the concepts that prevailed in the nineteenth century. Both proponents[78] and opponents[79] of humanitarian intervention agree that the celebrated nineteenth century interventions were actuated by a variety of motives, some of them wholly selfish. Stowell summarized the nineteenth century experience in a sentence that might be taken to reflect the current status of humanitarian intervention after Bangladesh: "Desirable as it is that humanitarian intervention should be, whenever possible, both disinterested and collective, this cannot be made a condition for the justification of the action taken."[80]

A good case can be made for the proposition that the world community has indeed accepted the Indian operation in Bangladesh as legitimate, despite India's selfish interest in seeing the dismemberment of the Pakistani state. To be sure, the General Assembly overwhelmingly supported a resolution calling for an immediate ceasefire and withdrawal of troops on December 7, 1971, during the heat of fighting, and this might be regarded as a moral victory for Pakistan.[81] The Soviet Union

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[76] McDougal & Feliciano, supra note 4, at 17-18.

[77] Reisman, supra note 7, at 16.

[78] Stowell, supra note 14, at 64.

[79] Brownlie, supra note 3, at 339-340.

[80] Stowell, supra note 14, at 63-64.

[81] The vote was 104 in favor, 11 opposed, with 10 abstentions. 9 U.N. Monthly Chronicle 89, 91 (Jan. 1972). Mr. Bhutto certainly regarded this vote as pro-Pakistani. Id. at 30.

was forced to use its veto to defeat a similar ceasefire resolution proposed in the Security Council by the United States on December 13.[82] But it soon became clear that the people of Bangladesh were welcoming the Indian Army as their liberator, not as an aggressor, and within a few short days the Pakistani forces were compelled to surrender. World opinion was changing, too; on December 15 the head of the Pakistani delegation, Mr. Bhutto, walked out of the United Nations after delivering an emotional speech blaming the world community for condoning Indian "aggressions."[83] India was not condemned, nor even censored, by an U.N. organ, for its forcible intervention; despite the landslide vote in the General Assembly for an immediate ceasefire, the "member nations seemed reconciled to India's use of force."[84] The Pakistani forces were soon compelled to surrender, and Mrs. Gandhi proclaimed a ceasefire on December 17.[85]

In the succeeding months evidence accumulated supporting the proposition that the world community had indeed recognized the Indian intervention as lawful. During the debates in August 1972 over the admission of Bangladesh to the United Nations, the Washington charge d'affairs of the People's Republic of Bangladesh noted in a letter to the President of the Security Council that over 85 countries, including four permanent Members of the Security Council, had accorded full diplomatic recognition to the new Rahman government, and that Bangladesh had already been admitted to full membership in several international organizations of the U.N. "family".[86] Bangladesh's application for membership was defeated only by the Chinese veto.[87]

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[82] The vote was 11 in favor, 2 opposed, with 2 abstentions. Id. at 34.

[83] Id. at 37.

[84] Nanda, supra note 7, at 66.

[85] 9 U.N. Monthly Chronicle 41 (Jan. 1972).

[86] 9 U.N. Monthly Chronicle 24 (Aug.-Sept. 1972).

[87] The vote was 11 in favor, 1 opposed, with 3 abstentions. Id. at 30. Two of the abstaining delegates explained their votes as expressions of the view that the question of admission should be postponed until the issue of the repatriation of the 90,000 Pakistani prisoners of war had been resolved. Id. at 27-28.

Ultimately, therefore, the world community may be said to have approved the Indian operation in Bangladesh. India no doubt had selfish motives, but it was also acting in the common interest in stopping the slaughter of the people of East Bengal. In the end the world community agreed with the Indian delegate who said "it was not India that sought to dismember Pakistan. It was the oppressive regime of West Pakistan which had dismembered Pakistan by its actions."[88]

To recapitulate: humanitarian intervention doctrines can indeed be abused, and even where humanitarian motives are genuine, a state may intervene for a variety of other motives, some of them purely selfish. Yet neither of these problems compels the conclusion that humanitarian intervention ought to be proscribed entirely. Any legal system, any legal doctrine, is subject to abuse; it is always necessary to distinguish the genuine claims from the spurious. Secondly, a state's corollary non-humanitarian motives may be disregarded if the intervention as a whole is genuinely in defense of the common interest in remedying gross violations of human rights and if the operation is conducted within limits set by the world community.

Other criticisms of the doctrine are not nearly so substantial. Dr. Brownlie complains that "the institution did not conspicuously enhance state relations and was applied only against weak states. It belongs to an era of unequal relations."[89] Dr. Brownlie's focus is entirely on the stability of inter-state relations. No emphasis is placed on protections to be accorded individual human beings; they are to be treated as so much cannon fodder in a Machiavellian game of power politics. Dr. Brownlie's argument can be attacked on his own ground, however; clearly state relations are not enhanced if elites in effective control are authorized, under misguided principles of absolute non-intervention, to commit brutal violations of human rights. This point will be developed at greater length in the next section of this essay, but for the moment one need only recall the tragic history of the rise and fall of Hitler's Third Reich. In the words of John Humphrey: "The Second World War and the events leading up to it was the catalyst that produced the revolutionary developments in the international law of human rights that characterize the middle twentieth century . . .. It was as no other war had ever been a war to vindicate human rights."[90]

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[88] 9 U.N. Monthly Chronicle 34 (Jan. 1972). (Remarks of Mr. Sadar Swaram Singh.)

[89] Brownlie, supra note 3, at 340-341.

[90] "The International Law of Human Rights in the Middle Twentieth Century" in M. Bos (ed.), The Present State of International Law and Other Essays 75, 82-83 (1973).

In short, deprivations of human rights can threaten international peace and security and thus end up by destroying the amicable state relations Dr. Brownlie wishes to preserve.

Dr. Brownlie's second point is that the interventions were undertaken only against weak states. If the Second World War is perceived as in part a humanitarian effort, this contention is simply wrong. Apart from this, the main problem lies in the fact that the "era of unequal relations"[91] is still with us; no one would invade the Soviet Union to redress the rights of Soviet Jews; the risk of nuclear war is prohibitive. An implicit cost/benefit analysis occurs in every decision to use force. Nuclear war would mean the destruction of all basic values; the principle of proportionality requires that the world community confine its protests against the treatment of Soviet Jews to non-military sanctions. Just because it is difficult to move against the Soviet Union for its deprivations of human rights does not mean, however, that small states should be able to persecute ethnic or racial groups with impunity. This would elevate the fiction of "sovereign equality" into even more of a shibboleth.

One other policy reason against humanitarian intervention is commonly invoked: "the consideration that outside interference, far from improving the position of victims of persecution, may, by drawing upon them the wrath of their governments, achieve the contrary result."[92] Generally, this argument is invoked when non-military interventions are being proposed, as in the economic sanctions against Rhodesia or South Africa. The argument has a superficial theoretical appeal, but, as Lauterpacht points out, "must be regarded as contrary to experience. The fury of persecution receives an impetus not only from foreign acquiescence, but also from the hesitation and reserve of foreign intercession

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[91] In a footnote Dr. Brownlie cites nineteenth century authorities who "considered that humanitarian intervention applied only to 'semi-civilized states' which did not have full international status." (At 341.) Stowell, however, rejected this distinction: ". . . when . . . a civilized state transgresses the dictates of humanity, it also may be constrained to reform its conduct." Stowell, supra note 14, at 65, citing authority to similar effect. In other words, both "civilized" and "semi-civilized" states were equally subject to humanitarian intervention; there was no "era of unequal relations". Moreover, a state perpetrating these kinds of abuses could scarcely be called "civilized"; the distinction is totally meaningless.

[92] Lauterpacht, supra note 22 at 32.

coupled with courteous admission that there is no right of intercession."[93] In other words, it is the doctrine of non-intervention that is counter-productive, not the doctrine of humanitarian intercession.

IV. The Article 2(4) Problem: Reconciliation of Humanitarian Intervention with the United Nations Charter

The chief doctrinal problem faced by both proponents and opponents of the theory of humanitarian intervention arises from its omission from the text of the Charter. Dr. Brownlie admits that "humanitarian intervention has not been expressly condemned by either the League Covenant, the Kellogg-Briand Pact, or the United Nations Charter"[94]; any prohibition or allowance of humanitarian intervention must be read in by implication.

Opponents of humanitarian intervention argue that the "general prohibition of resort to force"[95] found in Article 2(4) of the Charter covers humanitarian intervention as well. If the framers of the Charter "had wished to exclude humanitarian interventions from these prohibitions they would have done so expressly."[96] The argument of the pro-

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[93] Id. at 32-33. Sir Hersch cites instances where the British government abstained from protecting its own Jewish nationals from the persecutions of Czarist Russia and Nazi Germany!

[94] Brownlie, supra note 3 at 342. This is a significant concession. The next step in the argument justifying humanitarian intervention would be to invoke the principle of the Lotus case that any state is authorized to take any action which is not specifically prohibited by a rule of international law. Case of the S. S. "Lotus", [1972] P.C.I.J. Ser. A, No. 10. This approach is correctly rejected by Nanda as "rigid and doctrinaire and . . . unrelated to the context of a situation", but it is often useful in debate. Nanda, "The United States' Action in the 1965 Dominican Crisis: Impact on World Order--Part I", 43 Denver L. J. 439, 478 (1966).

[95] Brownlie, supra note 3, at 342.

[96] A. Thomas & A. Thomas, The Dominican Republic Crisis 1965 (1967) at 22, describing the Latin American position. [Hereinafter cited as Thomas & Thomas, Dominican Republic.] This bit of treaty construction is not overly persuasive: one could just as easily insist that the framers explicitly state what uses of force they were prohibiting. This is in line with the philosophy of the Lotus case, supra note 94.

ponents is a bit more sophisticated. Professors McDougal[97] and Reisman have taken the lead in developing a doctrinal justification of humanitarian intervention, and their arguments deserve recapitulation in some detail.

Professor Reisman maintains that a "close reading of [Article 2(4)] will indicate that the prohibition is not against the use of coercion per se, but rather the use of force for specified unlawful purposes."[98] The text is worth quoting in full:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.

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[97] McDougal's position has undergone significant change since he wrote his comprehensive treatise on Law and Minimum World Public Order with Feliciano. As he explains: "I'm ashamed to confess that at one time I lent my support to the suggestion that Article 2(4) and the related articles did preclude the use of self-help less than self-defense. On reflection, I think that this was a very grave mistake, that Article 2(4) and Article 51 must be interpreted differently . . .. In the absence of collective machinery to protect against attack and deprivation, I would suggest that the principle of major purposes requires an interpretation which would honor self-help against prior unlawfulness. The principle of subsequent conduct certainly confirms this. Many states of the world have used force in situations short of the requirements of self-defense to protect their national interests." McDougal, "Authority to Use Force on the High Seas," 20 Naval War College Rev. 19, 28-29 (No. 5, 1967). McDougal's earlier position echoed the conclusion taken by the Thomases: "The general international law right of an individual nation or group of nations to intervene for humanitarian purposes remains unchanged, except that this intervention may no longer be taken by means involving the use or threat of force." Thomas & Thomas at 384. (Emphasis added.) This conclusion led the Thomases to comment ironically that "from a practical point of view it would seem that the Charter encumbers rather than advances . . . human right and fundamental freedoms . . .." (Id. at 312.) Such a pessimistic outcome should have led the Thomases to reappraise their earlier conclusion. The principle that humanitarian intervention can only be undertaken in self-defense has persisted, but many jurists invoking this theme take a broad view of self-defense. See Comments by S. Sharma on "Report of the International Committee on Human Rights," International Law Association, New York Conference, 1972, 47-48, 52-53.

[98] Reisman, supra note 7, at 16.

Professor Reisman then goes on and states that "Since a humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the state involved and is . . . in conformity with the most fundamental peremptroy norms of the Charter, it is distortion to argue that it is precluded by Article 2(4)."[99] Some critics have found a "literal violation"[100] of the Charter in India's intervention in East Pakistan, which resulted in a territorial change and the dismemberment of Pakistan. The problem with this literalist view is that the words "territorial integrity" and "political independence" provide no magical touchstone for appraisal of Indian policy. Those terms of art certainly are neither self-defining nor self-explanatory; to put content into them requires more searching inquiry.

Traditional international law did not make "territorial integrity" or "political independence" an absolute rule, subject to no qualifications or exceptions. Indeed, the "abuse of sovereignty" doctrine expressly held that "territorial integrity" and "political independence" had to be exercised in accordance with the expectations of the world community, within the limits set by international law. It is unreasonable to assume that the draftsmen of the Charter, fresh with the experience of the Second World War, a war fought "to vindicate human rights,"[101] would have disregarded that experience to enact an absolute rule of nonintervention which would allow a new Hitler to persecute humanity at his pleasure. It is much more reasonable to assume that they preserved the "abuse of sovereignty" rule and its underlying policy, especially after evidence of the most shocking kind of "abuses of sovereignty" began to accumulate from Auschwitz, Dachau, and Buchenwald.

The conceptual reconciliation of the doctrines of humanitarian intervention with the language of Article 2(4) can be distilled into the following syllogism:

1. Article 2(4) prohibits the threat or use of force against the "territorial integrity" or "political independence" of any state.

2. Any state must exercise its "territorial integrity" and "political independence" within limits set by international law; if a ruling elite perpetrates

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[99] Ibid.

[100] Henkin, supra note 41 at 96.

[101] Humphrey, supra note 90 at 83.

crimes against humanity or otherwise engages in conduct which shocks the conscience of mankind, it has exceeded those limits.

3. Intervention for humanitarian purposes is not undertaken against the "territorial integrity" or "political independence" of another state, but only against the excessive and abusive conduct of the offending government. International law does not permit brutalities to be committed under the protective cloak of "territorial integrity" and "political independence".

4. Hence, humanitarian intervention is not inconsistent with the strictures against the use of force contemplated by Article 2(4) but instead "represents a vindication of international law",[102] a practical means of enforcing the purposes of the Charter to promote and protect human rights in the world community.

In a sense, proponents of humanitarian intervention have met their burden of persuasion at this point, since they have shown that humanitarian intervention is not literally inconsistent with Article 2(4). Since Article 2(4) did not change the customary international law on the use of forceful self-help for humanitarian purposes, and since "the doctrine appears to have been so clearly established under customary international law that only its limits and not its existence is subject to debate,"[103] there is no further need to engage in additional justifications.

Yet support for a modern doctrine of humanitarian intervention can be found in other portions of the Charter; arguments in favor of humanitarian intervention can be derived from the Charter itself, not merely in spite of the prohibitions of Article 2(4). As Professor Reisman writes:

> In terms of its substantive marrow, the Charter strengthened and extended humanitarian intervention, in that it confirmed the homocentric character of international law

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[102] Reisman, supra note 7 at 16.

[103] Lillich, supra note 23, at 210.

> and set in motion a continuous authoritative process of articulating international human rights; reporting and deciding infractions; assessing the degree of aggregate realization of human rights; and appraising its own work.[104]

The Preamble of the Charter expresses the determination of the peoples of the United Nations "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women. . . . " Significantly, a later paragraph of the Preamble expresses a commitment "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest. . . . " The juxtaposition of these commitments in the Preamble compels the conclusion that "the use of force in the common interest, such as for self-defense or humanitarian purposes, continues to be lawful."[105] The Charter draftsmen therefore reaffirmed not only their faith in fundamental human rights, but also their approval of the customary remedies of human rights enforcement, including humanitarian intervention. Otherwise, the lofty preambular statements of the Charter become an empty piety.

Article 1(2) of the Charter specifies the major purposes of the United Nations and expressly links "the principle of equal rights and self-determination of peoples" with the strengthening of "universal peace." Article 1(3) declares that "human rights" and "fundamental freedoms" are "international problems". Significantly, Article 1(1) also affirms that the primary mission of the United Nations is "to maintain international peace and security" through "effective collective measures for the prevention and removal of threats to the peace. . . . "[106] Article 55 of the Charter articulates even more clearly the "intimate nexus between human rights and minimum world order":[107]

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

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[104] Reisman, supra note 7 at 7.

[105] Id. at 8.

[106] Emphasis added.

[107] McDougal & Reisman, supra note 6 at 12.

> a. higher standards of living, full employment, and conditions of economic and social progress and development;
>
> b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperations; and
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[108]

Article 56 transforms these commitments of the United Nations Organization into an active obligation of each individual Member to take all appropriate actions in defense of human rights:

> All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.[109]

Articles 55 and 56 may properly be read to include an implicit right of humanitarian intervention, particularly when gross violations of human rights threaten international peace and security. The nexus between international peace and security and the most fundamental human rights has been perceived by many jurists. The late Judge Lauterpacht perhaps put it best when he wrote that:

> The correlation between peace and observance of fundamental human rights is now a generally recognized fact. The circumstance that the legal duty to respect fundamental human rights has become part and parcel of the new international system upon which peace depends, adds emphasis to that immediate connexion.[110]

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[108] Emphasis added.

[109] Emphasis added.

[110] Lauterpacht, supra note 6, at 13.

Yet would not humanitarian intervention in itself constitute a breach of the peace? Judge Lauterpacht also explained away that seeming paradox:

> In the eyes of governments there was often deemed to exist a conflict between the defence of human rights through external intervention and the considerations of international peace threatened by such intervention. That conflict was, in the long run, more apparent than real. For, ultimately, peace is more endangered by tyrannical contempt for human rights than by attempts to assert, through intervention, the sanctity of human personality.[111]

Moreover, a "threat to the peace" is already in existence whenever any elite embarks on a policy of genocide or other inhuman behavior. Deprivations of this sort, even if they occur only within the territorial bounds of a single state, are ineluctably a matter of grave international concern:

> It has been too often confirmed that practices of indignity and strife which begin as internal in physical manifestation in a single community quickly and easily spread to other communities and become international.[112]

In an intensely interdependent world, where communications are nearly instantaneous and practically universal, deprivations of human rights necessarily have international impacts. If a ruling elite is able to perpetrate atrocities with impunity, other elites will be tempted to throw off their restraints. Perhaps, if the world community had reacted with vigor to the mass starvation of the Ibo population in Nigeria, the Pakistani government would not have attempted to suppress the Awami League with such brutality. Humanitarian intervention is necessary not only to remedy current and immediate violations of human rights, but also to serve as a deterrent to future deprivations.[113]

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[111] Id. at 32. (Emphasis added.)

[112] McDougal & Reisman, supra note 6, at 13.

[113] Nearly every decision has effects stretching beyond its immediate outcome. A trend can develop a remarkable momentum in a very short time. Professor Moore cites as examples the wave of fascist regimes that came to power shortly before World War II and the more re-

In short, the institution of humanitarian intervention is necessary if "threats to the peace" are to be squelched in time. Articles 55 and 56 explicitly authorize and require separate as well as joint action in defense of human rights as a means of removing threats to international peace and security. As Professor Reisman concludes:

> . . . the cumulative effect of the Charter in regard to the customary institution of humanitarian intervention is to create a coordinate responsibility for the active protection of Human rights: members may act jointly with the Organization in what might be termed a new organized, explicitly statutory, humanitarian intervention or singly or collectively in the customary or international common law humanitarian intervention. In the contemporary world there is no other way the most fundamental purposes of the Charter in relation to human rights can be made effective.[114]

There would seem to be little argument that the United Nations itself could authorize international humanitarian operations involving the use of military force.[115] The Charter itself provides abundant proof that human rights are not "within the domestic jurisdiction of any state" under Article 2(7),[116] and "insofar as human rights deprivations giving

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cent trend toward decolonization. Decisions regarding intervention in contexts other than humanitarian also have significant long-run effects. Moore, supra note 8 at 152-153.

[114] Reisman, supra note 7 at 13.

[115] Henkin, supra note 41, at 96.

[116] McDougal and Reisman sum up the history of the "domestic jurisdiction" clause in the following passage: "The concept of domestic jurisdiction in international law has never been impermeable. Actions occurring within the territorial bounds of one state with palpable deprivatory effects upon others have always been subject to claim and decision on the international plane. There has scarcely ever been a case of major proportions in which the principle of domestic jurisdiction has not been invoked; when transnational effects have been precipitated, the principle has rarely barred effective accommodations in accord with inclusive interest. Hence, domestic jurisdiction means little more than a general community concession

cause for humanitarian intervention constitute a "threat to the peace" or "breach of the peace" or "act of aggression", the Security Council, under Chapter VII of the Charter, is seized with a mandatory jurisdiction."[117] Article 2(7) expressly provides that the principle of domestic jurisdiction "shall not prejudice the application of enforcement measures under Chapter VII." If the Security Council "has demonstrated either incapacity or unwillingness to act, the secondary powers of the General Assembly, confirmed by the Uniting for Peace Resolution, come into operation."[118]

Of course, as a matter of policy, it would be desirable for most humanitarian interventions to be undertaken under formal international auspices.[119] In the immeidate post-war era, some scholars expressed the hope that United Nations procedures would prove sufficient to protect human rights. Especially if the Security Council could function as planned, there would be little need for an individual right of humanitarian intervention under Articles 55 and 56. Thus, Judge Jessup wrote in 1948:

> The landing of armed forces of one state in another state is a "breach of the peace" or "threat to the peace" even though under traditional international law it is a lawful act. It is a measure of forcible self-help, legalized by international law because there has been no international organization competent to act in an emergency. The organizational defect has now been at least partially remedied through the adoption of the Charter, and a modernized law of nations should insist that the collective measures envisaged by Article I of the Charter shall supplant

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of primary, but not exclusive, competence over matters arising and intimately concerned with aspects of the internal public order of states. Where such acts precipitate major inclusive deprivations, jurisdiction is internationalized and inclusive concern and measures become permissable." McDougal & Reisman, supra note 6 at 15.

[117] Reisman, supra note 7, at 12, citing Articles 24 and 39 of the U.N. Charter.

[118] Id. at 33, citing Articles 25 and 2(6) of the Charter.

[119] Professor Nanda defines a "better world order" as "world in which unilateral coercion across state lines gives way to collective action undertaken only by international organizations." Nanda, note

> the individual measures approved by traditional international law.[120]

Of course, the tragic history of the Cold War has frustrated this idealistic hope. The expectations of the founders of the Charter have been frustrated by the lack of Great Power unanimity in the Security Council, and ideological differences have similarly on occasion paralyzed the General Assembly. Hence, an individual right of humanitarian intervention, which is authorized under Articles 55 and 56, remains even more essential as a functional substitute for formal international action. Judge Jessup recognized the cogency of these precepts when he wrote:

> It would seem that the only possible argument against the substitution of collective measures under the Security Council for individual measures by a single state would be the inability of the international organization to act with the speed requisite to preserve life. It may take some time before the Security Council, with its Military Staff Committee, and the pledged national contingents are in a state of readiness to act in such cases, but the Charter contemplates that international action shall be timely as well as powerful.[121]

In practical application, all of the post-Charter instances of humanitarian intervention have been undertaken only after a failure of the United Nations to take appropriate action. Professor Lillich in his review of the Belgian-American operation in the Congo in 1964 concludes that "the United Nations and the Organization of African Unity were unable to cope with a situation which required immediate action . . . if ever there was a case for the use of forcible self-help to protect lives, the Congo rescue operation was it."[122]

94, supra at 442. A "Better" world order is not the one we have, however, and if international organizations are unable to cope with major international problems, some form of individual self-help is a practical necessity.

[120] P. Jessup, A Modern Law of Nations 169-170 (1948).

[121] Id. at 170-171.

[122] Lillich, "Forcible Self-Help by States to Protect Human Rights," 53 Iowa L. Rev. 325, 340 (1967).

The American intervention in the Dominican Republic is more complicated factually, in that United States forces remained for a considerable period after American and foreign nationals had been removed. This gave rise to the criticism that "The United States intervened forcibly in the Dominican Republic . . . not primarily to save American lives, as was then contended, but . . . primarily on the fear of 'another Cuba' in Santo Domingo."[123] The United States was also assailed on the ground that the United States had not consulted with the OAS members beforehand. In the words of the Soviet delegate to the Security Council, the United States "confronted them with a fait accompli, convening the Council of Ministers only after landing its troops in the Dominican Republic."[124] Despite these formidable challenges to the American action, no critic "[denied] that on the evening of April 28 [when the U.S. intervention began], Santo Domingo was in the throes of internal conflict, that the public order had already been disrupted, and that hundreds of foreign nationals felt unsafe and wanted to leave the country."[125]

In justifying the American omission of consultation with OAS members, the Johnson Administration stressed the need for immediate action. President Johnson declared that the American intervention was not precipitate: "Some 1,500 innocent people were murdered and shot, and their heads cut off, and six Latin American embassies were violated and fired upon over a period of 4 days before we went in."[126] Undersecretary Mann emphatically affirmed this point: "We did not consider it necessary to wait until [more?] innocent civilians had been killed in order to prove to the most skeptical that lives were in danger. Had we done this we should have been derelict in our duty to our citizens."[127]

Reasonable men may differ over the issue of consultation in the Dominican case.[128] In response to the Johnson Administration's argument that time was of the essence, Representative Ogden Reid said:

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[123] 111 Cong. Rec. at 23002. (Remarks of Senator Fulbright.)

[124] 2 U.N. Monthly Chronicle 4 (June 1965).

[125] Nanda, supra note 94 at 464-465.

[126] 53 Dept. State Bull. 19, 20 (1965).

[127] Id. at 734.

[128] Nanda, supra note 94, at 467-468 summarizes the main arguments on both sides.

> I am not persuaded, that it was not possible to take 5 minutes, 15 minutes, a half-hour, or even an hour to have consulted with the OAS, and at least have informed them at the highest level of our thinking and to consult with them with regard to the decision. . . . [129]

In an interdependent world, patterns of consultation and cooperation are essential in all areas of human activity.[130] For the moment, however, it is significant to note that critics of the Johnson policy in the Dominican Republic did not base their criticisms wholly or even predominately upon the failure of the Administration to consult the OAS. Notwithstanding this omission, Senator Clark considered the initial American action valid "on humanitarian grounds."[131] Senator Morse approved the initial landing of troops as valid, not only on moral and humanitarian grounds, but also under international law.[132] Senator Fulbright agreed that a small force intervening for the "express purpose of removing U.S. citizens and other foreigners from the island" was justifiable.[133] If such a force were promptly withdrawn after it had completed its mission, Fulbright said that no "fair-minded observer at home or abroad would have considered the United States to have exceeded its rights and responsibilities," and "the incident would soon have been forgotten."[134]

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[129] 111 Cong. Rec. 24094 (daily ed. Sept. 23, 1965).

[130] The modern international monetary system is a good example. For a trenchant criticism of American "abrupt unilateral action" during the "monetary explosion of August 15, 1971," see E. Rostow, Peace in the Balance, 336-337 (1972).

[131] 111 Cong. Rec. 23369 (daily ed. Sept. 15, 1965).

[132] Id. at 26183.

[133] Id. at 23001.

[134] Ibid.

In summary, even the most severe critics of the operation in the Dominican Republic recognize that some form of humanitarian intervention can be lawful. Although critics decried the failure of the Johnson Administration to consult with the OAS, apparently they conceded the point that decisions of this sort often have to be made promptly to be effective. Certainly the United Nations had neither the means nor the will to react to the Dominican crisis. In summary, "the Dominican Republic case, whatever conclusions are drawn about the total operation, confirms the lawfulness of humanitarian intervention and indicates with even greater precision than does the Congolese case the conditions and limitations of humanitarian intervention."[135]

The Bangladesh case is a much better case for demonstrating the total paralysis of the United Nations and the concomitant need for some form of individual self-help. The world for months had received reports of "atrocities unparalleled in history."[136] Yet the world community did next to nothing, just as it had done next to nothing to mitigate the horrors of the Nigerian civil war. In the Security Council debate of December 12, 1971, the Indian delegate summed up the situation with a fair degree of accuracy:

> It was not India which declared or started war; it was not India which was responsible for creating the conditions that led to the present unfortunate conflict; it was not India which deliberately and systematically refused to meet the aspirations of the 75 million people inhabiting the country, once part of Pakistan; it was not India which perpetuated the repression, genocide, and brutality which provided the springboard for the freedom movement of Bangla Desh, which led to the decision of the people of that region to create a free and independent nation; it was not India which forsook the long period of nine months during which a reasonable political settlement could have been evolved with the leaders and people of Bangla Desh.
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> The United Nations had been unable to deal with the root cause of the problem in East Bengal. Informal consultations in the Security Council in July and August indicated that the international community could not, due to limitations born of its commitments to

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[135] Reisman, supra note 7, at 29.

[136] N. Y. Times, May 30, 1971, at 5:1, quoting the description of Justice A. S. Chowdhury, Vice Chancellor of the University of Dacca and the Pakistani member of the U.N. Human Rights Commission.

> the doctrine of domestic jurisdiction, act in the matter. In the face of a direct violation of the Universal Declaration of Human Rights and the provisions of Articles 55 and 56 of the Charter by Pakistan, the Security Council and the United Nations should have found themselves in a position to intervene and persuade Pakistan to return to reason. That did not happen. While developments proceeded on their inexorable course towards the present tragedy, the United Nations continued to be inhibited by considerations of domestic jurisdiction.[137]

The Indian delegate's reference to Article 2(7) was, in a sense, ironic, especially considering the number of resolutions and the amount of effort that has been devoted to demonstrating that human rights violations in South Africa and Rhodesia were matters of international concern. Clearly, if there was ever a case where human rights deprivations had palpable transnational effects, Bangladesh was it: an estimated 10 million refugees had fled to India, and thousands more were fleeing from the wrath of the Pakistani army each day.[138] Despite this tremendous impact on India's economic and political infrastructure, Secretary General Thant, in his September Annual Report, said that in his exchanges with the governments of India and Pakistan, he had been "acutely aware of the dual responsibility of the United Nations, including the Secretary-General, under the Charter both to observe the provision of Article 2, paragraph 7, and to work, within the framework of international economic and social co-operation, to help promote and ensure human well-being and humanitarian principles."[139] This conception of a "dual responsibility" paralyzed both the Secretary-General and the United Nations.

The Secretary-General's construction of Article 2(7) is plainly at variance with its express language. Article 2(7) declares that the

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[137] 9 U.N. Monthly Chronicle 29 (Jan. 1972). (Remarks of Mr. Sardar Swaram Singh.)

[138] Nanda, supra note 7 at 66.

[139] 8 U.N. Monthly Chronicle 130 (Oct. 1971).

principle of domestic jurisdiction "shall not prejudice the application of enforcement measures under Chapter VII." Enforcement measures were in order, since it was abundantly clear that Pakistani brutality not only constituted an immediate "breach of the peace" but also imminently threatened international peace and security on a much wider scale. This is not merely the wisdom of hindsight; everyone knew that events in East Bengal were approaching crisis proportions. Yet the Secretary-General "did not use the authority granted him under Article 99 to bring the matter before the Security Council for discussion, nor did he ask the General Assembly to meet in an emergency session since the Council was unwilling to meet."[140] The Secretary-General's inaction can rightly be described as an abdication of professional responsibility.

In summary, the United Nations failed to take any effective measures in response to massive atrocities in East Pakistan; it failed to head off the crisis by persuading the parties to arrive at a political settlement; and it ultimately failed to prevent the war. Surely the Indian operation must be considered a legitimate measure of self-help because of, in Judge Jessup's words, "the inability of the international organization to act with the speed requisite to preserve life."[141]

Some recapitulation of the main points of this section is in order. The doctrine of humanitarian intervention is not inconsistent with the general prohibition of the use of force found in Article 2(4) of the Charter, since humanitarian intercessions are not directed at the territorial integrity or political independence of any state but are only aimed at remedying gross affronts to human dignity.[142] The words "territorial integrity", "political independence", and "domestic jurisdiction" do not provide a talismanic shield behind which barbaric ruling elites can perpetrate atrocities with impunity.

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[140] Nanda, supra note 9 at 63-64.

[141] Jessup, supra note 120, at 170-171.

[142] With regard to Bangladesh or, more generally, on claims for self-determination, note that the principle of self-determination in the form of territorial disintegration is a complementary opposite to principles of territorial integrity and continuity of state organization or political independence. India's humanitarian intervention which contributed to Pakistan's territorial disintegration must be assessed in terms of its aggregate consequences upon all values in reference to community policies. "The principle of 'territorial integrity' is no more absolute or sacred than the principle of 'domestic jurisdiction'. Both principles must fall before our overriding concern for human dignity." E. Suzuki, Self-Determination and World Public Order: Community Response to Group Formation 187 (Unpublished J.S.D. Thesis, Yale University Law School, 1974).

Furthermore, the United Nations Charter itself proclaims an "intimate nexus between human rights and minimum world order,"[143] particularly in the Preamble and in Articles 1 and 55. Article 56 obligates member states to take both joint and separate action in defense of human rights and thus includes an implicit right of humanitarian intervention, particularly when gross violations of human rights threaten international peace and security. In short, the right of humanitarian intervention is entirely consistent with the major purposes of the Charter[144] and, indeed, constitutes a vindication of international law.

Finally, although the United Nations posses the power to authorize and conduct humanitarian operations, the history of the post-war period indicates that international organizations have been paralyzed in their attempts to cope with humanitarian crises. The Security Council in particular has not developed into the kind of effective, plenary body the framers of the Charter anticipated. Unfortunately, in the contemporary world, it is simply no answer to suggest that all humanitarian interventions be undertaken under formal international auspices. In the first place, the draftsmen of the Charter preserved an individual right of humanitarian intervention under Article 56. Secondly, post-war state practice demonstrates that prior Security Council approval is not a requirement for humanitarian intervention under international law. Lastly, and most importantly, if an individual right of humanitarian intervention is not preserved, human rights will be lacking in effective protection.

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[143] McDougal & Reisman, supra note 6 at 12.

[144] Professor Franck dissents from this view, arguing rather bizarrely that "Humanitarian intervention has, in practice, become a legal concept which, whether or not it violates the provisions of Article 2(4) and 2(7) of the Charter (as I believe it does), certainly violates the public policy which underlies the Charter and its provision for equality, independence, and self-determination of States." Cited by R. Quadri in Report of the International Committee on Human Rights, International Law Association, New York Conference 1972 at 45. Emphasis added. It is a weird kind of policy that enables all states to practice genocide with "equality" and with total "independence" from international action. "Self-determination", for Professor Franck, apparently means that Karachi can ruthlessly impose its will on the people of East Bengal, even if it has to slaughter them to make them realize their "self". If these are the public policies behind the Charter, we need a new United Nations. Of course, they are not the policies of the Charter, and all we need is a less preposterous interpretation. Professor Franck recently reiterated his view in Franck & Rodley, supra note 9.

V. Criteria for an Acceptable Humanitarian Intervention: The Requirements of Contemporary International Law

As noted above, "humanitarian intervention is an extraordinary remedy, an exception to the postulates of state sovereignty, and territorial integrity which are fundamental to the traditional theory, if not the actual practice of international law."[145] Humanitarian intervention should thus be considered only as a last resort; the intervening state must show that it has exhausted all available remedies. Humanitarian interventions will be measured, as are all uses of force by states, by the twin requirements of necessity and proportionality.

In order to assess the requirements of necessity and proportionality in a particular case, it is absolutely essential to employ a detailed contextual analysis of the situation giving rise to the claim to intervene for humanitarian purposes. There is no escape from this difficult and often lengthy task; no doctrinal formula can make appraisal of the particular claim any easier.

The celebrated cases of humanitarian intervention, both before and after the adoption of the United Nations Charter, display a wide variety of participants, a significant diversity of perspectives, and a multiformity of strategies and modalities. While there has been no unique pattern, there have been some uniformities in practice: "A trend study indicates that choice of modality depended on the nature, intensity, and location of the humanitarian threat, the capacities of the intervening power, and the projection of the intervenor as to the most efficacious and economic means of securing humanitarian succor."[146] Relevant contextual inquiry should focus on the following features of the social process:

A. Situations

What is the extent of human rights violations in the affected area? Are the deprivations complained of isolated incidents, or do they fit into a pattern of systematic governmental persecution? The Thomases argue that "governmental participation is a material element of a crime against humanity, for only when official organs of sovereignty participate in

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[145] Reisman, supra note 7 at 2.

[146] Id. at 18-19.

atrocities and persecutions do crimes assume international proportions."[147] This is too narrow a view. In a civil war situation in which the generally recognized government has lost effective control, major deprivations can occur which certainly "assume international proportions". Indeed, as earlier noted, some jurists consider this to be the only situation giving rise to a lawful claim of humanitarian intervention.[148] The Congolese and Dominican cases repudiate the Thomases' notion that "official participation" in the deprivations is a prerequisite to lawful intervention.

Nevertheless, in situations short of the anarchy of civil war, it is likely that governmental participation in the persecutions or atrocities will be relatively easy to detect. In any event, the deprivations must be of such a magnitude to justify resort to the use of force. In the context of a "typical" struggle for power among competing factions, Professor Farer cautions against intervention on behalf of any faction because of the uncertainties involved in determining "the net potential gain in human rights:"[149]

> Even if we could predict the length of the conflict and the number of wounds and fatalities it would cause, with what could they be compared? Certainly not only with the human cost of the inequity or ineptitude which preceded the revolt, for we would also have to take into account the uncertain political and social consequence of either a successful or unsuccessful rebellion. The calculus is imponderable, obviously, not only at the beginning of conflict, but also during its course.[150]

In the "atypical" context of "an immediate threat of genocide or other widespread arbitrary deprivation of human life in violation of international law," however, Professor Farer regards unilateral intervention as permissible.[151] Apparently when a crisis has reached these pro-

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[147] Thomas & Thomas, at 374.

[148] See text accompanying supra note 18.

[149] Farer, "On Professor Moore's Synthesis in Moore (ed.), supra note 38, at [MS. 8].

[150] Ibid.

[151] Id. at [MS. 26].

portions there is less need to agonize over a decision to employ military force, because inaction and delay will probably result in greater loss of human life than the efficacious use of force. Indeed, as military operations go, humanitarian interventions have been remarkably successful in carrying out their mission with the minimum loss of human life. In some instances this success is attributable to the overwhelming military superiority of the intervening forces. In the Bangladesh case, however, the antagonists were more evenly matched; India's quick victory is attributable at least in part to the inability of the Karachi government to rely on the fidelity and support of the population of East Bengal. A government which perpetrates crimes against humanity suffers not only from a weak moral position, but from a poor strategic one.

Since humanitarian intervention is an "extraordinary remedy," the violations of human rights which give rise to it must also be extraordinary. Any decision to use force must take into consideration "the terrible lacerations of human rights occasioned by armed conflict."[152] Yet, in a proper case, it would appear that humanitarian operations can be undertaken with the minimal loss of life. Although no use of force is perfectly predictable in all its consequences, the consequences of non-intervention may be both foreseeable and appalling.[153]

B. Participants

Article 56 of the U.N. Charter implicitly authorizes a unilateral right of humanitarian intervention. Some critics "distinguish sharply" between multilateral intervention and unilateral national intervention, contending that only multilateral action undertaken under Security Council approval is lawful.[154] This view both misreads the Charter and is

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[152] Id. at [MS. 8].

[153] In the Congolese case, for example, the rebel leader, Christophe Gbenye, clearly signalled his intentions: "We will make our fetishes with the hearts of the Americans and Belgians, and we will dress ourselves with the skins of The Americans and Belgians." 52 Dept. State Bull. 18 (1965). This was not an idle threat. One evacuee reported that he had witnessed a number of executions of native Congolese in which "the most illustrious of those killed had their hearts cut out and eaten in public by the rebels." (The Times, London, Nov. 25, 1964, at 12:2.

[154] Quadri, supra note 144, at 45.

unsound in policy. Especially in crisis situations where the need for an immediate response is evident, unilateral national action may be the only effective means of preventing loss of life. All that is required is that the unilateral action be taken in accordance with the common interest, with the inclusive interests of all humanity.

This is not, of course, to argue against multinational participation in humanitarian operations. Wide participation itself is the strongest evidence that genuine common interests are being defended. Most preferable would be action taken within the frame of authoritative international organizations. The organization could intervene directly or could delegate humanitarian missions to its members. If United Nations does act, however, there is strong argument that its competence should be exclusive.[155]

If U.N. or regional action is not possible, collective intervention is preferable to intervention by a single state, again for obvious policy reasons. Collective action by states with differing social systems, with different racial or cultural backgrounds, would also be an impressive display of action manifestly taken in the common interest.

"Where circumstances require a unilateral humanitarian intervention, the operation should be submitted to inclusive authoritative appraisal as soon as possible."[156] Certainly all such operations should be promptly reported to the Security Council. It is advisable to "internationalize" a unilateral humanitarian intercession as soon as possible. A week after the initial American military landing in the Dominican Republic, for example, the OAS authorized the creation of an Inter-American Peace Force which replaced certain United States contingents with forces from seven Latin American nations.[157]

Participation by local forces of the state where the humanitarian intervention is taking place raises more complicated problems. In a civil war situation there is considerable international pressure to avoid

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[155] Jessup, supra note 120 at 170-171.

[156] Reisman, supra note 7 at 30-31.

[157] Thomas & Thomas, Dominican Republic at 37-38.

taking sides in the conflict.[158] In a rebellion situation, on the other hand, claims are often made to intervene on behalf of the "constitutional government," enabling it to enforce "its municipal statutes relating to rebellion."[159] The boundary line between rebellion and civil war has never been a very satisfactory one, and some writers[160] deny the legality of assisting an existing government against an insurgency. The question of neutrality when one side or another is perpetrating atrocities may well turn out to be a false one, however. In any event, participation in the operation by one of the struggling factions would not add much to the inclusivity of participation and may raise troublesome questions about the underlying purposes of the intervention.

C. Perspectives

1. Objectives of the Intervenor

As noted earlier, the most persistent criticism of humanitarian intervention doctrine emphasizes the multitude of selfish reasons which lead states to intervene and the potentiality of abuse that is inherent in allowing states to make unilaterally the initial decision to intervene. Humanitarian intervention "may be a disguise for the advancement of nationalistic or ideological coercive designs . . .."[161] It is misleading to suggest, however, that doctrines of unilateral self-help allow an intervening state to become "judge and jury in its own case."[162] Any decision to employ force is subject to the contemporaneous appraisal of the world community, and "later review by a higher authority such as the Security Council, the General Assembly, or the Meeting of Consultation of Ministers of Foreign Affairs can either affirm or deny the legality of the original decision . . .."[163]

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[158] For a listing of the varying doctrines, see Brownlie, supra note 3 at 323-327. For a simplistic emotional statement on the inadmissability of all armed intervention, see G.A. Res 2131(305). (Reprinted in 60 Am. J. Int'l L. 662 [1966].)

[159] McDougal & Feliciano, supra note 4 at 535.

[160] 1 C. Hyde, International Law (2nd rev. ed.), 182, 253; G. Lawrence, Principles of International Law 131-132 (7th ed. 1930).

[161] Thomas & Thomas, Dominican Republic at 18.

[162] Ibid. [163] Ibid.

If abuse of humanitarian intervention is to be minimized, detailed appraisal of the perspectives and objectives of the intervening state is a practical necessity. The main problem is to distinguish the genuine claims from the spurious. "It is of particular importance that latent (or disguised) objectives be distinguished from manifest (proclaimed) objectives."[164] It is the intervening state acting on behalf of the common interest of the whole community in halting atrocities, or are the humanitarian arguments merely window dressing to cover up special interests destructive of the common interest?

The world community has been alert to the potentiality of abuse and has subjected each claim to intervene for humanitarian purposes to intense scrutiny. In the U.N. debates over Bangladesh, for example, the Indian delegate was compelled, under close questioning about the motives of the Indian action, to declare that "The entry of India's armed forces into Bangla Desh was not motivated by any intention of territorial aggrandizement. . . . India had a clear and formal understanding with the Government of Bangla Desh that the armed forces of India would remain in Bangla Desh territory only so long as the people and Government required and welcomed their presence."[165]

Similar questions and answers about the intervenor's intentions have been raised and responded to in every case involving humanitarian claims. In the Dominican Republic crisis, Secretary of State Rusk admitted that the primary motive for the American intervention had switched from the purely humanitarian objective of saving lives to a different purpose--the prevention of a Communist take-over of the country:

> What began in the Dominican Republic as a democratic revolution was taken over by Communist conspirators who had been trained for and had carefully planned that operation. Had they succeeded in establishing a government, the Communist seizure of power would, in all likelihood, have been irreversible, thus frustrating the declared principles of the OAS. We acted to preserve the freedom of choice of the Dominican people until the OAS could take charge and insure that its principles were carried out.[166]

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[164] McDougal, Lasswell & Chen, "Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry," 63 Am. J. Int'l L. 237, 242 (1969).

[165] 9 U.N. Monthly Chronicle 28, 29 (Jan. 1972). (Remarks of Mr. Sardar Swaram Singh.)

[166] Statement of Secretary of State Dean Rusk of May 8, 1965, on communist subversion, The Dominican Crisis, Dept. State Pub. 7971, Inter-American Series 92 (1965).

This shift in objectives is also evidenced by changes in the American military deployment. On April 28, the President ordered the landing of 400 Marines on Dominican soil; this probably would have been sufficient force to carry out a rescue mission for American and other foreign nationals. The next day, however, President Johnson made the decision to reinforce the additional contingent, and ultimately the United States troop build-up surpassed 20,000 Marines.[167] This latter decision was interpreted by the world community as reflecting the determination of the United States to prevent "another Cuba" in the Caribbean. Critics of the intervention distinguish sharply the legality of the initial landing from the subsequent build-up. In the view of the Thomases:

> That United States action which had been predicated on protection of human life was not subject to extreme criticism, but vehement protest was registered at what was called an arrogant assumption by the United States of power to intervene unilaterally in an internal revolutionary situation in a nation of the Western Hemisphere when the United States unilaterally determined that a dangerous degree of communist participation was involved.[168]

In summary, both the perspectives and the actions of the intervening state will be closely insepcted to determine the legality of the particular claim. As Professor Reisman notes, "The Dominican Republic case, whatever conclusions are drawn about the total operation, confirms the lawfulness of humanitarian intervention and indicates with even greater precision than does the Congolese case the conditions and limitations of humanitarian intervention."[169]

2. Perspectives of the Intervenee

Publicists in the field of humanitarian intervention have devoted little systematic attention to the perspectives of the relevant domestic participants in the state subjected to humanitarian operations. Much of the literature has focused on the problem of obtaining the "consent" of the generally recognized government to humanitarian operations within its territory. A number of situations can be envisaged, each one conceivably requiring different policies.

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[167] Thomas & Thomas, Dominican Republic at 7.

[168] Id. at 24. Emphasis added.

[169] Reisman, supra note 7 at 29.

Humanitarian intervention originally grew up out of the "abuse of sovereignty" doctrine under which any state could intervene against a sovereign who treated his subjects in such a way as to shock the conscience of mankind. To impose a requirement of consent in this situation would emasculate the remedy: no tyrant would willingly give his consent to operations that would end his tyranny. If there is a requirement for an invitation to intervene in such a case, Vattel indicated that the oppressed people had the right to issue an invitation to foreign powers:

> Si le prince, attaquant les lois fondamentales, donne à son peuple un légitime sujet de lui resister, si la tyrannie, devenue insupportable, soulève la Nation, toute puissance étrangère est en droit de secourir un peuple opprime, qui lui demands son assistance.[170]

An invitation from the victims of oppression would be easily obtainable; indeed, one could imply an invitation from the victims in such a situation.

In cases short of an "intentional malfeasance on the part of the State in which the act occurred," Professor Franck would require the intervening state to seek permission from the government of the affected state.[171] This requirement would apply to situations of rebellion and civil war, the only difference being that "a State intervening on the side of the government [in a civil war situation] is really engaging in an act of war against a belligerent, and the laws of war apply, including the right of the other side to receive similar aid from its foreign friends."[172] This seems to open up the possibility for multiple interventions, many of them not of a humanitarian character, and subsumes the distinctive character of a humanitarian intervention into the more general law regarding aid to particular factions in situations of civil strife. Professor Franck admits that his categorization gives rise "to important questions of fact-perception which are not readily resolvable.[173]

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[170] E. Vattel, 2 Droit des Gens 56 (T. Pomroy ed. 1805).

[171] Franck, supra note 57, at 50.

[172] Ibid.

[173] Ibid.

Arguably a state undertaking a humanitarian intervention should dissociate itself as much as possible from support of any particular group engaged in the domestic struggle for power; its primary goals are to preserve human life and to prevent atrocities, not to influence the outcome of the internal political process. Of course, neutrality is impossible if one of the contending factions is committed to a policy of genocide, but this comes closer to the case of "intentional malfeasance" noted earlier.

Professor Franck's concern with consent is understandable; a requirement of consent may reduce the potentialities of abuse inherent in a doctrine of self-help. Professor Franck cites the 1964 Stanleyville rescue as an instance "when the government of a sovereign State, having committed no malfeasance of its own but being unable to protect aliens from danger, will call upon a friendly ally to help."[174] Of course, permission of the host government may be perceived as taking the entire operation out of the category of forcible self-help, since the intervention at the request of a foreign state is not then technically a derogation from "sovereignty". Although one State Department official argued in this vein in justifying the Congo operation,[175] Professor Lillich comes closer to the mark when he says that "the United States treated the Congolese invitation as just another factor permitting it to participate in an humanitarian intervention, rather than as the sine qua non of such intervention's legitimacy."[176]

Even if the intervening state is required to seek the consent of the recognized government for any humanitarian operations taken in the course of rebellion or civil war, this would not eliminate the possibility of abuse of humanitarian intervention doctrines. Consent itself is readily manipulable. Considerable doubt has been raised about the authenticity of the request by the Dominican Military Junta for the United States armed forces in the 1965 crisis in the Dominican Republic. The official view of the United States is that the call came from the "military officials then exercising such authority as there was in the Dominican Republic," that they could not guarantee protection of Ameri-

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[174] Ibid.

[175] Cleveland, "The Evolution of Rising Responsibility," 52 Dept. State Bull. 7, 9 (1965).

[176] Lillich, supra note 122 at 340.

can citizens and other foreign nationals.[177] The United States did not recognize the Junta and did not "intervene . . . on the side of the antirebel forces . . . to put down the revolt, as the United States was requested to do on April 28 by the antirebel military junta."[178]

This view was seriously challenged by congressional critics who argued that the American Ambassador had solicited the invitation from Colonel Benoit, who headed the military junta. In the words of Senator Clark:

> At the insistence of the CIA—I believe it can be documented--a new junta headed by a certain Colonel Benoit had been formed, although it was pretty well confined to the San Isidro air base. That junta sent word to Ambassador Bennett, "You had better send American troops in because a Communist takeover threatens."
>
> Ambassador Bennett sent word back, "I can't get away with bringing Americans in on that ground because the evidence is not clear. If you will change your request and make it in writing, and ask American forces to intervene in order to protect American lives, then I believe that we can persuade Washington to do it."
>
> So Benoit changed his position and put it on the basis of protecting American lives. Bennett forwarded that post haste to the State Department and to the White House, and troops were sent in.[179]

Other authorities claim that Ambassador Bennett "visibly sponsored the creation of the Junta."[180] Obviously, a solicited request from a

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[177] 52 Dept. State Bull. 913, 915 (1965). (Reprint of Ambassador Stevenson's statement in the Security Council.)

[178] 53 Dept. State Bull. 62 (1965).

[179] 111 Cong. Rec. 23366 (daily ed. Sept. 17, 1965). For similar effect see id. at 23001 (remarks of Senator Fulbright, Sept. 15, 1965) and at 26185 (remarks of Senator Morse, Oct. 15, 1965).

[180] T. Szulc, Dominican Diary 53 (1965).

sponsored "government" would cast doubt on the integrity of the consent. Professor Nanda notes that the Johnson Administration made no effort to deny Senator Clark's version of what happened and declares that "the United States' decision to send troops could be justified on Ambassador Bennett's appraisal of the situation and not merely on the request from the military Junta . . . ."[181] In other words, as in the Congo, the United States treated the invitation from the Junta "as just another factor permitting it to participate in an humanitarian intervention, rather than as the sine qua non of such intervention's legitimacy."[182]

In retrospect, it would seem that the United States would have been better advised not to seek the consent of any faction in the Dominican struggle. In many situations, consent can become a formalized ritual, covering up the genuine issues. The Soviet Union obtained the consent of the ousted Hungarian Communist puppet government to put down the Nagy revolt of 1956, but this did not conceal the Soviet act of aggression.[183] In the Dominican case the effort to obtain a formal consent implicated the United States more deeply with one of the competing rivals and thus cast doubt on the validity of the underlying humanitarian motives of the operation. Although the United States officially refused to recognize the Junta as the legitimate Dominican government, there is no doubt that the Benoit faction was helped by American recognition of its authority to requisition foreign assistance. For these reasons, a requirement of consent, far from reducing the possibilities of abuse of humanitarian doctrines, seems to increase the possibility that the humanitarian intervention is to be justified in a particular instance, it ought to be justified on the basis of necessity and proportionality, not on the basis of a technical requirement of consent.

D. Strategies

Nowhere are the requirements of necessity and proportionality more apparent than in the choice of the relevant strategy. Considerations

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[181] Nanda, supra note 94 at 466-467.

[182] Lillich, supra note 122 at 340.

[183] For realistic criteria on when "internal conflict has reached a level which requires a freeze on military assistance to a recognized government," see Moore, supra note 8 at 201.

of strategy have been discussed at some length throughout this paper, but they deserve some brief recapitulation. For obvious reasons, the world community has tended to prefer low coercion to high coercion strategies. Initially, an intervening state is required to exhaust all available remedies before embarking on a unilateral humanitarian operation. Use of the diplomatic, economic, and ideological instruments should be considered as an alternative to the use of the military instrument, since they are typically regarded as less coercive. If humanitarian objectives can be attained by alternative means, use of the military instrument would not meet the test of necessity. A state would similarly be required to demonstrate that organized international action is unavailable and ineffective before intervening on its own accord. Use of the military instrument is also more justified when the violation of human rights is imminent and immediate, because under those conditions it is likely that there is no other recourse.

Considerations of proportionality require that the minimal amount of force necessary to protect human rights be employed. The relative power positions of the intervenor and intervenee states must be taken into account; no one would think of mounting a humanitarian military operation against the Soviet Union for its treatment of the Jewish minority. Humanitarian intervention in such cases constitutes a hazard to the very persons whom it is designed to protect, to say nothing of the probability of igniting the entire globe in a nuclear holocaust.

State practice has also indicated that humanitarian operations be limited not only in their use of coercive measures but also in the duration of the mission. A half-hearted intervention may be worse than no intervention at all, for it could prolong the conflict and increase the agony. The use of force must be quick and effective if it is to be proportional. The Congo operation is a case par excellence of compliance with this principle. As soon as the rescue was accomplished, the troops were withdrawn at the request of the Congolese government, a demand "readily acquiesced in by the United States."[184] The Congolese case merits comparison with the American action in the Dominican Republic. Professor Lillich concludes that "while the initial landing of five hundred Marines meets the proportionality test, it is hard to justify the subsequent build-up to over 20,000 men, much less their prolonged presence in the country, on traditional forcible self-help grounds."[185] Indeed, official explanations of the legal basis for the continued deployment of American troops shifted to other justifications, most notably the prevention of a Communist take-over in the country. The use of a minimally coercive strategy of limited duration is thus a reliable in-

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[185] Ibid.

dicator of the objectives sought by the intervening power. The longer the troops remain after performance of the mission, the more their presence will be perceived as intervention for impermissable, non-humanitarian purposes.

E. Outcomes

The most important outcome of any humanitarian intervention should, of course, be the termination of affronts to human dignity. Conduct which shocks the conscience of mankind must be arrested; human lives must be preserved. Other outcomes include the short-term restoration of minimum public order and the longer-term rehabilitation of the victims of oppression. Long-term rehabilitation is more appropriately a job for the world community as a whole, not for any particular intervening state. If an intervening state remained in military control of the affected territory for a long period of time, this may sometimes be regarded as unjustified interference in domestic affairs. The most significant exception to this general rule was, of course, the presence of the Allied occupying troops in Germany and Japan after the Second World War to effect de-Nazification and demilitarization programs. These occupations had the support of the world community and were perceived as necessary measures in the common interest to prevent possible future aggression. In that sense they were truly international in scope.

If humanitarian arguments are advanced solely as a pretext to allow an intervening state to pursue other goals, the outcomes of the intervention will, of course, be quite different. Hitler's occupation of the Sudetenland is a good example; the failure of appeasement at Munich contributed to a pattern of aggression that eventually resulted in the Second World War.

Different problems emerge when a humanitarian outcome is mixed with outcomes of a different nature. For example, the creation of Bangladesh resulted both in the termination of Pakistani brutality and in the creation of a wholly new balance of power on the Indian subcontinent. Under ordinary circumstances Indian military operations designed to foster the dismemberment of the Pakistani state would be thwarted by the world community. Yet India's self-interest did not prevent the over-all operation from being in the common interest involved in bringing to an end atrocities which posed grave threats to international peace and security.

In the Dominican Republic case the international community approved the humanitarian outcome--the rescue of foreign nationals in grave danger--and vigorously criticized the non-humanitarian outcome--the installation of a government acceptable to the United States. The former outcome was perceived as consistent with the common interest, the latter only in the special interest of the United States. Once again, the Do-

minican case is important because it indicates the limits the world community is likely to impose on the conduct of humanitarian operations.

F. Effects

The long-term effects of humanitarian intervention may ultimately prove more important than an individual outcome. Humanitarian intervention, like any criminal sanction, has as its object not only the remediation of current and immediate violations of human rights, but also the deterrence of future deprivations. The absence of an effective deterrent, conversely, would lead to more serious violations, since ruling elites would quickly discover that they could perpetrate atrocities without protest or condemnation. Since widespread violations of human rights are known to constitute threats to international peace, some sanctioning process is essential if the likelihood of war is to be reduced.

Abuses of humanitarian intervention doctrine must also be deterred. The long-term effect of the Dominican Republic case has been to put the United States and other would-be intervening powers on notice of the limits placed on humanitarian intervention under international law. Of course, the sanctioning process in this instance is by no means perfect, and it would be difficult to deter a major military power from undertaking a sham humanitarian operation if it decided to pay the price of world condemnation. The Soviet invasion of Czechoslovakia is tragic testimony to this point. Humanitarian intervention is not the only institution that is vulnerable to this kind of abuse, however, and a flat prohibition of humanitarian military operations would be equally unsuccessful in deterring a determined aggressor from his illegal goals. Nevertheless, it would be wrong to underestimate the power of current international sanctioning processes. Abuses of humanitarian intervention doctrines have not been as prevalent as critics of humanitarian intervention would have one believe.

In summary, a modern law of humanitarian intervention would serve as an effective remedy to redress current violations of human rights and would provide a credible deterrent to future deprivations. Abuses of humanitarian intervention cannot be prevented in their entirety, but the long-term effect of a modern doctrine of humanitarian intervention would be to make abuse less likely because states would be sanctioned for their failure to abide by limits on the conduct of humanitarian intercession under international law.